



May 31, 2011

Ms. Christine Varney
Assistant Attorney General, Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Chairman Julius Genachowski
and
Ms. Renata Hesse
Senior Counsel to the Chairman for Transactions
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Assistant Attorney General Varney, Chairman Genachowski and Senior Counsel Hesse:

The Electronic Frontier Foundation writes to share our opposition to the proposed merger of AT&T, Inc. and T-Mobile USA from our perspective as a participant in the public debate about network neutrality, the FCC's Open Internet Rules processes, and our longstanding interest in maintaining the favorable conditions for innovation and protecting consumer interests in wireless as well as wired networks.

One of the major contributing factors to the risk of non-neutral behavior by carriers is the lack of sufficient competition. Because of this, and because of our concerns about the FCC's jurisdictional claims and the potential for unintended consequences of the proposed (and now adopted) Open Internet Report and Order, EFF has maintained that the preferable way to avoid discriminatory conduct and achieve network neutrality by carriers is through fostering competition and preventing the consolidation of market power. Thus, if the Administration, both the FCC and the Department of Justice, seeks to support a more neutral, more innovation-friendly digital communications infrastructure, it should use its efforts to assist in the creation of more competitors, rather than fewer. The merger thus represents a step in the wrong direction.

EFF has long been an active participant in the ongoing technological and policy debates about network neutrality, including uncovering (along with the Associated Press) non-neutral behavior by Comcast,¹ developing software tools to Test Your ISP² and seeking a DMCA exemption to let users run applications of their choice on their mobile phones.³ EFF also provided comments about efforts by the FCC to address network neutrality as part of its Open Internet rulemaking process.⁴ While EFF has raised serious concerns about the methods that the FCC has chosen to

¹ <https://www.eff.org/deeplinks/2007/10/eff-tests-agree-ap-comcast-forging-packets-to-interfere>

² <https://www.eff.org/testyourisp>

³ <https://www.eff.org/deeplinks/2008/12/remixers-unlockers-jailbreakers-oh-my>

⁴ <https://www.eff.org/files/filenode/nn/EFFNNcomments.pdf>; <https://www.eff.org/press/archives/2010/01/14>

try to achieve neutrality, we have long been, and remain, one of the strongest, most consistent supporters of an open Internet and neutrality in practice.

EFF has been disappointed in the FCC's failure to recognize the need for neutrality in the wireless market. This failure was brought into relief in late 2010, when the Open Internet rules issued by the FCC contained several large loopholes, including a loophole for mobile carriers.⁵ EFF believes that neutrality is necessary for all kinds of Internet service, and that a distinction between wired and wireless not only defies reason, it also abandons the portion of the network that is currently most lacking in openness and neutrality. Users are increasingly demanding the ability to do many, if not all, of the same things in a wireless environment that they do in a wired one. The appropriate criterion for whether applications should be available on mobile devices is not whether they are blessed by the carriers, but whether the subscriber's plan provides sufficient bandwidth and quality of service to run them. Regardless of what regulation may look like or whether there is any regulation at all, there shouldn't be a distinction between the neutrality available on wired services and that available on wireless services.

This is the backdrop against which the AT&T/T-Mobile merger must be considered. The merger would remove one competitor from the already consolidated mobile market, leaving Verizon and Sprint as the only other major competitors. It would result in a single carrier controlling almost 42 percent of wireless subscribers, with approximately 128 million customers and a monopoly in the GSM service marketplace.⁶ The merger would also result in two companies, AT&T and Verizon Wireless, controlling nearly 80 percent of the U.S. wireless market.

Given these facts, the most likely consequences for the neutrality of wireless Internet services if this merger is approved are decreased competition and increased risk of non-neutral behavior by the remaining carriers. When there are only three choices, consumers have less ability to "vote with their feet."⁷ This prevents the market forces from serving their corrective role when a carrier acts in a discriminatory manner or otherwise treats its customers poorly, whether by promulgating unfair or unfriendly policies or by failing to fulfill its stated policies in practice. Equally important, new innovators providing network-based services have less ability to reach the public if they have to navigate powerful self-interested gatekeepers with near monopoly power rather than an open playing field of competitors.

While we recognize that both this specific merger and the broader network neutrality issue raise

⁵ <https://www.eff.org/deeplinks/2010/12/genachowski-wins-sort>. Other loopholes that concern EFF include the allowance for discriminatory behavior in order to pursue alleged copyright infringement and the large loophole for law enforcement.

⁶ Although there are some other GSM carriers in the US, including TracPhone and a number of much smaller businesses, these carriers resell access to AT&T or T-Mobile's networks, have limited regional availability, or both. This potential GSM monopoly is of particular concern to individuals who have purchased expensive GSM smartphones.

⁷ The current number of market players is undesirably low as it is, and consumers already feel the impact. For example, many phones work only on one carrier's network, and customers pay hefty penalties when they break their contracts. This effectively prevents consumers from moving among providers in search of lower price or better service, and may also inhibit entry by new competitors.

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complex questions without easy answers, EFF believes that if the Administration approves this merger it will be acting inconsistently with its stated commitment to an open Internet. More fundamentally, by giving a stamp of government approval to the effective creation of a duopoly in wireless services, the Administration will undermine its public interest role of helping to foster competition and innovation.

Please do not hesitate to contact me with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. A. Cohn', with a stylized, flowing script.

ELECTRONIC FRONTIER FOUNDATION

CINDY A. COHN
Legal Director